The right to grant divorces is one of the most important and necessary powers vested in the judicial legislation of a State. The sovereignty of the commonwealth is assimulated to the omnipotence of Parliament, unless it be restrained by some provision in the constitution of the United States or of the state.

I. In Martin v. Hunter, 1 Wheaton, 325, Judge Story says the amendment to the constitution, declaring that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people," is declaratory, and that without the amendment the sovereign power vested in the state governments would remain unaltered and unimpaired, except so far as it was granted to the United States, or the people had reserved it to themselves in their state constitutions. The constitution of the United States has prescribed no limitation to the exercise of the power, and the constitution of Pennsylvania has but one limit, viz., when, by existing laws, the Courts are empowered to decree a divorce. The general power to grant divorces is therefore vested in the legislature, who are the sole and supreme judges of their jurisdiction, and the propriety of its exercise, subject alone to the restriction of cases within the jurisdiction of the courts.

This doctrine is sanctioned by the highest judicial authority; In the case of the Dartmouth College v. Woodward, 4

Wheaton, 518, C. J. Marshall recognizes the general right of the legislature of the states to legislate on the subject of divorces, and declares that the inhibition against impairing contracts did not interfere with the exercise of this power.

The Supreme Court of Pennsylvania, in a recent case, say that "where an individual changes his domicil there is no authority for the position that the government of the country which he left has the authority to follow and watch over his rights and property." Lestapies v. Ingraham, 5 Barr, 71. (Gibson, C. J.)

In the State of Maine, the Supreme Judicial Court, in answer to a request of the Legislature, gave an elaborate opinion, in which they affirm the unlimited power of the Legislature to grant Divorces, on the ground that the State have an interest in it (marriage) as a civil institution.

Chancellor Kent, in his last edition of the Commentaries, after reviewing the whole ground, recognizes the general power, and perceives no constitutional objection to its exercise. (2 Kent's Com. 6th ed. p. 107.)

Judge Story adds his authority, and says—Divorces can be pronounced by the Legislature, for such causes as in its wisdom it may choose from time to time to allow. Story, on Conflict of Laws, p. 304, sect. 202.)

In Scotland, from time immemorial, the same rule has prevailed, and the jurisdiction of the courts has been unlimited, whether the residence was temporary or permanent.

In England, at common law, marriage was held to be a

civil contract, precisely as it has been since the settlement of the province of Pennsylvania. As late as the time of Chief Justice Holt, the Court of King's Bench declared that an agreement to take each other as man and wife, without the intervention of a clergyman, and not *in facie ecclesiæ*, was a good marriage in the sight of God and the law of the land. Lord Hardwick's Marriage Act, passed in 1754, prohibited marriages of this description, still excluding Jews and Quakers. Jasson *v.* Collins, 2 Salk. 437; Wigmore's case, Id. 438; Dalrymple *v.* Dalrymple, 2 Haggard, 491–2.

The English courts for nearly a century, have held that no foreign court or legislature can decree a divorce from a marriage celebrated in England. In Dorsey *v.* Dorsey. 7 Watts, 349, this doctrine is stated by Chief Justice Gibson to be the sequent of the English dogma of allegiance. If this be the ground, they are not consistent, as they admit the domicil of a subject resident abroad, to govern in matters of succession and intestacy. But, whatever may have been the former rule, in the recent case of Warrender *v.* Warrender, 9 Bligh, 115, the House of Lords, under the guidance of Lords Brougham and Lyndhurst, abolished this absurd pretension, and decided that a marriage contracted in England, could be annulled in Scotland; and the Scottish Courts finally triumphed in the struggle to establish that the place of marriage and offence was altogether immaterial.

The exercise of the power to divorce has been gradually increasing in every country, and it may therefore be assumed that the legislature have the unlimited power to

annul marriages, except when prohibited by the section in the constitution; that within the state it cannot be questioned, in prosecutions for bigamy, adultery, in the succession and inheritance of property, or any other proceedings, criminal or civil, relating to the rights of the parties. Whenever a man places his foot on the soil of the territory, the state, without regard to allegiance or domicil, has the power to prescribe the mode of contracting marriage when celebrated without regard to marriage, allegiance or domicil; it has the power to enforce its obligations and punish their violation; and it must have the power to relax and destroy those obligations, unless some constitutional barrier is interposed. These powers are founded upon "principles of justice, good morals, and policy," and are paramount and immutable.

It is not intended to justify the exercise of this power in the cases of entire strangers, who, when not connected with the state by birth, domicil, marriage, offence, or any other tie, may come to the Legislature of Pennsylvania, and ask relief.

It is believed that there is no instance in which any Court has declared a divorce by the legislature of their own state void, except in the specified cases of which Jones *v.* Jones, recently decided by a majority of the judges in the supreme court of Penna. is an example.

II. But the perplexing question is: What respect will the courts of one state pay to divorces granted in another state? A general review of all the cases shews that when a court or

legislature of one state has granted a divorce when the parties lived and were domiciled in another state, the aggrieved party having had no notice, and there having been no judicial examination of the alleged offence, the courts of the state where the parties lived at the time of the application for divorce, will not recognise the divorce. The *locus delicti* cannot always be known or ascertained with precision by judicial authority, and it it is not therefore essential to jurisdiction.

Chancellor Kent, in the *original text* of his last edition of the Commentaries, and Judge Story, in his last edition of the Conflict of Laws, have both arrived at the same conclusion, and lay down the law that domicil is the test of JUDICIAL COURTESY by the courts of one state to divorces granted in another state. (2 Kent's Comm., 6th ed., 106–118; Story on Conflict of Laws, 302–352.) These Editions are the last products of the labors of those distinguished Jurists, and were both published *post mortem.*

These authors have paid a merited compliment to the opinion of C. J. Gibson, in Dorsey *v.* Dorsey, 7 Watts, 349, where upon appeal the jurisdiction of the courts in Pennsylvania was denied, because the respondent, the husband, at the time of the proceedings in the court, was domiciled in Ohio, was not amenable to the jurisdiction, had no notice of the proceedings, and was no party in any manner to the same. The libellant, the wife, had removed since the separation, to Pennsylvania, but the legal residence remained with the husband in Ohio. It is gratifying to the American student

to perceive that C. J. Gibson in this case has cleared the rubbish, and marked out the path which Lords Brougham and Lyndhurst subsequently travelled in the case of Warrender *v.* Warrender, where they overruled Lord Elden and sustained the courts of Scotland.

The domicil of a man is acquired instantly by his residence in a particular spot or place. A residence for a day, a week, or a month, is as good as for a much longer period. It must be bona fide and not collusive; by collusive is meant a colorable residence accompanied by the intention to return as soon as the divorce should be obtained. A man may honestly remove to another state, because he prefers the municipal regulations of that state, and not expose himself to the charge of collusion. Instances have occurred in Pennsylvania where its citizens have removed to another state to avoid the tax on collateral inheritances, and such removals daily occur between the slave and free states. The desire to enjoy a municipal regulation of another state is a proper reason for change of domicil, and is recognised by all international law. The change of Mr. Forrest's domicil was independent of his application, but if necessary might be conceded without risk. The authorities in Pennsylvania on this subject are numerous and without variation; the following are selected as examples. Grier *v.* O'Donnell, 1 Binney, 349; (note) Cooper *v.* Gilbrath, 3 Wash. 546; Reed *v.* Bertrand, 4 Wash. 514; Miller's Estate, 3 Rawle 312.

In the Aspden Estate, involving nearly a million of dollars in the Ct. C. U. S. Pennsylvania District, Judge Grier

lays it down as a fundamental rule, that "The domicil of origin easily reverts, and requires but few circumstances to establish it." White *v.* Brown, 1 Wallace Jr. 217.

In Scotland domicil has never been required. The same doctrine has been recently adopted in the case of Harding *v.* Allen, 9 Greenleaf, 140, where the Supreme Court of Maine recognized a divorce in Rhode Island upon petition of the wife, although the marriage had been celebrated and the offence had been committed in other states, and the husband had never lived in Rhode Island, but notice of the proceedings had been served upon him.

Chancellor Kent, in his last note to his Commentaries, published *post mortem*, (2 Kent's Comm., 111, (6th ed.) note,) after examining with his usual care and ability all the cases, thus concludes:

In Harding *v.* Allen, 9 Greenleaf's Reps., 140, it was held by the supreme judicial court in Maine, *that a decree of divorce did not fall within the rule that a judgment, rendered against one not within the state, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another state;* and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognised in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of the marriage, though not as to other parts of the decree, such as an order for the payment of money by the husband. The Chancellor adds:— "This is *an important and valuable decision, and settles the*

question, so far as the judicial authority of a single state can do it, against the English rule; and places it upon the same principles of justice, good morals, and policy, which render a marriage, valid by the law of the place where it was solemnized, valid everywhere."

III. The judicial and legal residence of the wife attaches to and follows that of the husband, no matter where she may actually reside. They are in this matter united and accounted by law as one person, nnd though a man may have for certain purposes two domicils, a wife can never have any domicil but that of her husband.

Mr. Phillimore, in his work on "The Law of Domicil," (pp. 27—36) treats this rule as inflexible, uniform, and without exception; he cites a number of cases, among them that of Henrietta Maria, mother of Charles the II., whose residence attached to that of her husband before and after his death though she had purchased a house and resided for twenty-five years in France. Mr. Shelford in his treatise on Marriage and Divorce and the other English elementary writers coincide, and it was one of the principles adopted in Warrender *v.* Warrender, before cited.

The case of Dorsey *v.* Dorsey, 7 Watts, 349, affirms in express terms that the domicil of the wife remains with the husband even after separation.

The Supreme Court of Massachusetts, in the case Greene *v.* Greene, 11 Pickering 410, have recognised the same rule, even though the husband had after separation changed his residence, and in that case the court gave the wife the

benefit of her husband's newly acquired residence, and thereby sustained the jurisdiction of the libel for divorce, residence within the state at the time of application being necessary by the Statute laws of Massachusetts. The case of Greene *v.* Greene is in all its material features analagous to the application of Mr. Forrest, and fully sustains the jurisdiction prayed for in the present case.

A synopsis of the law is contained in the following principles.

1. The Legislature have jurisdiction of divorces, and are the sole judges of the propriety of exercising the power, except where prohibited by the provision in the State Constitution.

2. The right of the State is incident to its sovereignty, founded upon public policy and morals, and so far as its validity within the State is concerned, is not dependent upon the domicil of either party.

3. The place of marriage, and *locus delicti* (place of offence), are not material.

4. The modern rule is, that residence or domicil is not necessary to give jurisdiction, and secure judicial courtesy or recognition of a divorce, granted in one State, by the courts of another State, where notice has been given.

5. That even according to the old rule, the domicil or residence for any length of time is not required.

6. That when the husband applies for a divorce the domicil of the wife follows that of the husband, and in such case, both parties are subject to the judicial tribunals of the

State where the husband is domiciled at the time of application.

IV. Having stated the law, a few remarks in relation to the facts in the application of E. Forrest, will be subjoined. E. Forrest was born in Philadelphia, on the 9th of March, 1806; he was educated in the State, purchased a house and resided here until the fall of 1837, when he married in England, and on his return to America, took a house in New York. He continued to reside there until the month of April, 1849, when he separated from his wife, broke up his establishment, and in the month of May 1849, returned to his mother's family in his native city. His removal was neither collusive nor fraudulent; it was the natural result of his situation; he had no other home to which he could go, and no other residence could be suggested by considerations of convenience or comfort. He would have made the same change of domicil if his wife had died, deserted him and gone abroad, or any other incident had occurred, which destroyed the link of residence. It was a change naturally produced by the course of events. (See Depositions of Henrietta Forrest and Edwin Forrest.)

The correspondence between Mr. and Mrs. Forrest, dated in Dec., 1849, and Jan'y, 1850, shews that at the time he removed to Philadelphia, he had no idea of applying for a divorce; and that, by mutual agreement at the time of separation, and until the 24th Dec., 1849, Mr. Forrest kept secret his grounds of complaint, when Mr. F. heard that

Mrs. F. had broken her promise, for the first time, Mr. F. felt himself authorized to promulgate to the world the facts.

Allegiance and protection are essential to sovereignty as soon as the individual comes within the territory of the Government. It is not necessary to enter into any discrimination between the power of the Legislature over a mere resident, and a citizen possessing the most plenary rights and privileges. At the time of the application Mr. Forrest was as fully and entirely a domiciled citizen of Pennsylvania, entitled to vote and enjoy other privileges, as if he had never left the State. (Const. of Penna., art. 3, sect. 1.)

Mrs. Forrest's legal residence followed that of her husband, and attached to her husband's domicil of birth or origin. The jurisdiction of the Legislature is therefore full and complete over both parties.

Mrs. Forrest has had ample notice of every step taken in this case:

1. The intended application, with an authenticated copy of the memorial.

2. The time and place fixed by the Committee of the Legislature to hear the parties.

3. The time and place to take the depositions of witnesses, for her convenience, fixed in New York.

She had ample means to employ counsel if she desired, and many friends to assist her. Mrs. Underwood deposes that after the application and before the taking of the depositions, she informed her (Mrs. F.) of the statement

she had furnished Mr. Forrest. It would have cost nothing to attend the examination of the witnesses; she has gone to the expense and trouble of sending a special agent to Harrisburg. She could have cross-examined the witnesses under protest against the jurisdiction of the tribunal and the regularity of the proceedings as she has done to the Legislature, and her refusal to attend by herself or her counsel at the examination of the witnesses is decisive. These remarks are based upon the course, deliberately adopted by Mrs. F. under the advice of the most able, zealous, and judicious counsel in the country.

The constitutional prohibition is not applicable. Mr. Forrest has not resided, previous to his application, one year within the state, and the case of Dorsey *v.* Dorsey, 7 Watts, 349, rules that the courts of Pennsylvania, in a case like the present, have no jurisdiction, and of course it is reserved to the Legislature.

It therefore appears that the Legislature have not only the power to grant the divorce, but that it is not obnoxious to the exception that it is asked without ample opportunity having been given to the opposite party to be fully heard on the merits of the case.

One more remark is subjoined; if the Legislature have no jurisdiction the courts of Pennsylvania can review the case and restore Mrs. Forrest to her pristine rights as though the divorce had never been granted.

Philadelphia, March 14, 1850.